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No. 02-931

In the Supreme Court of the United States

AIRSTAR HELICOPTERS, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Aviation Administration and the National Park Service issued a regulation pursuant to the Overflights Act, 16 U.S.C. 1a-1, that limits the number of air tours over the Grand Canyon National Park. The regulation creates an exception that allows air tour providers to conduct more air tours if they do so pursuant to a contract with the Hualapai Indian Tribe. The questions presented are:

1. Whether petitioner, a provider of air tours in the Grand Canyon National Park area, has standing to challenge the Hualapai Tribe exception.

2. Whether the Hualapi Tribe exception is subject to strict scrutiny or instead is constitutional if rationally tied to the federal government's special obligations to Indian Tribes.

3. Whether the Federal Aviation Administration and the National Park Service had authority to create the Hualapi Tribe exception absent express statutory authorization.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995)	4, 7
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	10
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977)	6
Fisher v. *District Court*, 424 U.S. 382 (1976)	7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	4, 5
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)	6-7
Morton v. *Mancari*, 417 U.S. 535 (1974)	4, 5-6, 8, 9
Morton v. *Ruiz*, 415 U.S. 199 (1974)	9
Rice v. *Cayetano*, 528 U.S. 495 (2000)	7, 8
Seminole Nation v. *United States*, 316 U.S. 286 (1942)	9
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998)	5
United States v. *Antelope*, 430 U.S. 641 (1977)	6
United States v. *Mitchell*, 463 U.S. 206 (1983)	9
Washington v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979)	6
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979)	6
Williams v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998)	10, 11

Constitution, statute and regulations:	Page
U.S. Const.:	
Art. III	4, 5
Amend. V	3, 5
Amend. XV	8
Airport and Airway Safety, Capacity, Noise Improvement, and International Transportation Act of 1992, Pub. L. No. 102-581, Tit. 1, § 134, 106 Stat. 4887 (16 U.S.C. 1a-1 note)	10
Overflights Act, Pub. L. No. 100-91, § 3, 101 Stat. 676 (16 U.S.C. 1a-1 note):	
§ 3(b)(1), 101 Stat. 676	1, 2
§ 3(b)(2), 101 Stat. 676	2
§ 3(c), 101 Stat. 677	10
14 C.F.R. 93.319(b)	2
14 C.F.R. 93.319(f)	2, 5
Miscellaneous:	
65 Fed. Reg. (2000):	
p. 17,708	2
p. 17,715	3
p. 17,718	2
pp. 17,718-17,719	2
p. 17,726	3, 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 298 F.3d 997.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2002. On November 6, 2002, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including December 14, 2002. The petition was filed on December 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Overflights Act, Pub. L. No. 100-91, § 3(b)(1), 101 Stat. 676 (16 U.S.C. 1a-1 note), requires the Secretary

of the Interior to submit to the Administrator of the Federal Aviation Administration (FAA) recommendations "regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." The Secretary's recommendations shall provide for the "substantial restoration of the natural quiet and * * * protection of public health and safety from adverse effects associated with aircraft overflight." *Ibid.* After receiving the Secretary's recommendations, the Administrator must prepare a "plan for the management of air traffic in the air space above the Grand Canyon." § 3(b)(2), 101 Stat. 676. The Administrator is required to "implement the recommendations of the Secretary without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety." *Ibid.*

Pursuant to authority conferred by the Overflights Act, the FAA and the National Park Service (NPS) issued a regulation that limits the number of commercial air tour operations that may occur in the area over the Grand Canyon National Park. 65 Fed. Reg. 17,708 (2000). Under the regulation, an air tour operator may not conduct more tours than it conducted between May 1, 1997 and April 30, 1998. *Id.* at 17,718; 14 C.F.R. 93.319(b). An exception to the regulation (the Hualapai Tribe exception), permits operators to conduct additional tours whey they contract with the Hualapai Tribe to use the Tribe's Grand Canyon West airport. 14 C.F.R. 93.319(f); see 65 Fed. Reg. at 17,718-17,719. The Hualapai Tribe is a federally recognized Indian Tribe.

The FAA and the NPS created the Hualapai Tribe exception in order to fulfill the government's trust responsibility to the Tribe. See 65 Fed. Reg. at 17,718. "The majority of the Reservation's inhabitants live

below the poverty level and unemployment was estimated in 1995 to range from 50-70 percent of the adult population." *Id.* at 17,726. Moreover, "[m]uch of the Tribal economy is based on tourism, and Grand Canyon West [Airport] has been identified by the Tribe as the primary means by which to address its high unemployment rate while preserving the Tribe's natural and cultural resources." *Ibid.* The Tribe collects at least $2.3 million annually from air tour operators. *Ibid.*

Because the Tribe relies so heavily on that source of revenue to support activities on the Reservation, the FAA concluded that limiting air tours that land at the Reservation would "significantly adversely impact the Hualapi Tribe's economic development and self-sufficiency," and threaten the Tribe's ability to maintain social services for its members. 65 Fed. Reg. at 17,715. The FAA explained that, "[b]ased upon the information provided by the Hualapai Tribe, approximately 45% of the Hualapai Tribe's global fund budget is derived from air tour operations at [Grand Canyon West]." *Ibid.* The FAA estimated that the Hualapai Tribe exception would reduce the economic loss to the Tribe by approximately $4.9 million during the period 2000-2009. *Id.* at 17,726.

The Hualapai Tribe exception also creates a substantial economic benefit for air tour providers. The FAA estimated that the Hualapai Tribe exception would reduce the cost of the overflight regulation to all air tour providers by $43.9 million over ten years. 65 Fed. Reg. at 17,726.

2. Petitioner and others filed a petition for review of the overflight regulation. They argued, *inter alia*, that Hualapai Tribe exception violates the equal protection component of the Fifth Amendment. The court of appeals rejected petitioner's challenges to the validity

of the regulation, including the challenge to the Hualapai Tribe exception. Pet. App. A1-A39. The court specifically rejected the contention that *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995), requires the exception to be analyzed under strict scrutiny. Pet. App. A24 n.8. The court concluded that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a federal law that gives special treatment to Tribes or their members is constitutional if rationally tied to the government's fulfillment of its trust obligation to the Tribes. Pet. App. A24 n.8. The court noted that "there is no dispute that the Hualapai exception is at least rationally related to 'the government's interest in fulfilling its trust obligation' to the Tribe." *Ibid.* (citation omitted). In response to the argument that *Adarand* implicitly overruled *Mancari*, the court of appeals stated that "lower courts do not have the power to make that determination." *Ibid.*

ARGUMENT

Petitioner lacks standing to challenge to the Hualapai Tribe exception. In any event, the court of appeals correctly ruled that the exception is constitutional because it is rationally tied to the federal government's trust obligation to the Tribe. That ruling does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held that a plaintiff must satisfy three elements in order to establish standing under Article III. First, the plaintiff must have suffered an injury in fact. *Id.* at 560. Second, there must be a causal connection between the injury and the conduct complained of, *i.e.*, the injury has to be fairly traceable to the chal-

lenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-561.

Petitioner cannot satisfy the first element of standing —injury in fact. The Hualapai Tribe exception does not make petitioner any worse off than it would be without the exception. To the contrary, the exception affords petitioner and other air tour operators the opportunity to conduct more air tours in the Grand Canyon area than they would be able to conduct without the exception. If an air tour provider enters into a contract with the Tribe and otherwise satisfies the requirements of 14 C.F.R. 93.319(f), the provider may conduct additional air tours without using its yearly allocation of air tours under the overflight regulation. Indeed, the FAA concluded that the economic value of the Hualapai Tribe exception to the air tour industry was nearly ten times greater than its economic value to the Tribe. See 65 Fed. Reg. at 17,726.

The government did not raise the standing issue below, and the court of appeals likewise did not address that issue in its decision. But since Article III standing is jurisdictional, it is properly raised here. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Because petitioner does not suffer injury in fact from the operation of the Hualapai Tribe exception, it lacks Article III standing to challenge that exception. For that reason alone, the petition for a writ of certiorari should be denied.

2. In any event, petitioner's challenge to the Hualapai Tribe exception is without merit. Petitioner contends (Pet. 7-11) that the exception creates a racial classification that is subject to strict scrutiny under the equal protection component of the Fifth Amendment. That contention is foreclosed by *Morton* v. *Mancari*,

417 U.S. 535 (1974), and subsequent decisions applying the principles established in *Mancari*.

In *Mancari*, the Court squarely held that distinctions based on the United States' unique trust relationship with Indian Tribes should not be equated with distinctions based on race that are prohibited by the Constitution. In that case, the Court upheld the constitutionality of a law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized Tribes who have "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24. Although the classification had a racial component, the Court concluded that the Indian employment preference was not a "racial preference," because it was "granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Id.* at 553 n.24. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

Since *Mancari*, the Court has repeatedly reaffirmed that "federal regulation of Indian affairs is not based upon impermissible [racial] classifications." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). It is "governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Ibid.* (citation omitted). See *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Moe* v. *Confederated*

Salish & Kootenai Tribes, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976).

Under *Mancari* and subsequent decisions, the Hualapai exception is clearly constitutional. Indeed, the classification at issue here is even more clearly political in nature than the classification at issue in *Mancari*. In *Mancari*, the hiring preference applied to individual Indians who were members of federally recognized tribes. By contrast, the Hualapai Tribe exception applies to air tour providers, whether Indian or non-Indian, who are operating under contract with the Hualapai Tribe itself. Moreover, the exception applies only to tours that use the airport on the Tribe's Reservation, which the United States holds in trust for the Tribe. And as the preamble to the overflight regulation explains, the exception was created to assist the economic development of the Tribe and to help the Tribe to fulfill its governmental responsibilities to its people. There is therefore no question that the exception is rationally tied to the federal government's trust responsibility to the Tribe.

Petitioner contends that this Court's decision in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), implicitly overruled *Mancari*. But *Adarand* held only that strict scrutiny applies to racial classifications. *Id.* at 227. Nothing in *Adarand* purported to disturb the Court's holding in *Mancari* that federal laws like those at issue in *Mancari* rest on permissible political classifications, rather than impermissible racial classifications.

Moreover, in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), a post-*Adarand* decision, the Court reaffirmed the *Mancari* line of cases. There, the Court explained that "[o]f course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its

responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.* at 519 (citing cases). The Court reiterated *Mancari*'s observation that "every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Ibid.* (quoting *Mancari*, 417 U.S. at 552). And it reaffirmed the holding in *Mancari* that the BIA preference was a constitutional political classification, rather than a suspect racial classification. *Id.* at 519-520. Applying the Fifteenth Amendment to the Constitution, the *Rice* Court refused to extend *Mancari* to "authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id.* at 520. But the Court left no doubt that under *Mancari* and other cases, Congress's authority to fulfill its trust responsibilities to Indian Tribes by enacting legislation for their benefit remains intact. *Id.* at 519-520. Petitioner's claim that *Adarand* implicitly overruled *Mancari* is therefore wholly without merit.

3. Petitioner next argues (Pet. 12-13) that the court of appeals' decision conflicts with *Mancari* and *Rice* because Congress did not expressly authorize the FAA and the NPS to create the Hualapai Tribe exception. But neither *Mancari* nor *Rice* held that federal agencies lack the authority to take into account the government's trust responsibility to Indian Tribes in carrying out their statutory responsibilities.

In support of its contrary view, petitioner relies (Pet. 12) on the statement in *Mancari*, 417 U.S. at 551, that the challenge in that case implicated the "plenary power of Congress * * * to legislate on behalf of federally recognized Indian tribes." Petitioner also relies on the statement in *Rice*, 528 U.S. at 520, that approval

of the preference at issue in that case would have extended *Mancari* to a "new and larger dimension." Neither of those statements suggests that an agency charged with carrying out statutory responsibilities may not take into account the government's trust responsibilities toward Indian Tribes, especially insofar as the agency's exercise of its regulatory authority would have a direct impact on the Tribe's Reservation.

Under this Court's decisions, the general trust responsibility applies to the federal government as a whole, not just Congress, and it therefore may properly be taken into account by federal agencies whose actions have a direct impact on a Tribe's Reservation. This Court has expressly stated that there exists "a general trust relationship between the United States and the Indian people." *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983). In *Mitchell* the Court referred to "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Ibid.* (quoting *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942)). And it noted that "[t]his principle has long dominated the Government's dealings with Indians." *Ibid.* (citations omitted). Moreover, in the area of Indian affairs, "the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary [of the Interior] and his delegates at the BIA." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). See *Mancari*, 417 U.S. at 552.

Petitioner's contention that the Hualapai Tribe exception is invalid because it is not expressly authorized by Congress also conflicts with basic administrative law principles. Under those principles, an agency that has been delegated authority by Congress to carry out a statutory program is free to pursue any reasonable

policy choice unless Congress has spoken directly to the issue. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984). Because the Overflights Act does not speak directly to the question at issue here, the FAA and the NPS were free to ensure that their overflight regulation would not adversely affect the economic development and self sufficiency of the Hualapai Tribe. Indeed, Congress itself *mandated* an exception for certain helicopter flights from the North Run of the Grand Canyon to locations on the Hualapai Tribe Reservation, as selected by the Tribe, for the purpose of transporting individuals to or from boat trips on the Colorado River. See Overflights Act, § 3(c), 101 Stat. 677; see Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. No. 102-581, Tit. 1, § 134, 106 Stat. 4887 (16 U.S.C. 1a-1 note) (directing Administrator of FAA, in consultation with, *inter alia*, "affected Indian tribes," to conduct a study and prepare a plan to manage increased air traffic over Grand Canyon National Park). In any event, the scope of the statutory authority of the FAA and NPS under the Overflights Act with respect to the Grand Canyon National Park presents no question of general importance warranting review by this Court.

4. Finally, petitioner errs in contending (Pet. 15-17) that the decision below conflicts with *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998). In that case, the Ninth Circuit held that, under *Mancari* and other cases, legislation is rationally tied to the fulfillment of the government's trust responsibility to the Tribe when it "relates to Indian land, tribal status, self-government or culture." *Id.* at 664. The court further concluded that interpreting the Reindeer Industry Act of 1937 to give Alaska

natives a monopoly over reindeer herding throughout the State would raise a serious constitutional question under that standard. *Id.* at 664-666. The court therefore invalidated an administrative regulation that interpreted the Act to afford such a monopoly. *Id.* at 666.

There is no conflict between the decision below and *Williams*. First, it was undisputed below that the Hualapai Tribe exception is rationally tied to fulfilling the government's trust responsibility to the Tribe itself. Pet. App. A24 n.8. The D.C. Circuit therefore had no occasion to address whether the *Williams* formulation accurately captures the *Mancari* standard. In any event, the Hualapai Tribe exception satisfies the Ninth Circuit's standard: it is rationally related to "Indian land, tribal status, self-government or culture." 115 F.3d at 664. The exception applies to air tours conducted under contract with the Tribe; it is limited to flights that land on the Tribe's Reservation; it preserves the economic foundation of the Tribe's capacity for self government; and it gives non-Indians additional opportunities to conduct air tours.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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